Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232

REPLY COMMENTS OF COLLEGIATE BROADCASTERS, INCORPORATED

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REPLY COMMENTS OF COLLEGIATE BROADCASTERS, INCORPORATED

1. Collegiate Broadcasters, Incorporated (CBI) respectfully submits the following reply comments on the Notice of Proposed Rulemaking, MB Docket 04-232. In this NPRM, the Federal Communications Commission sought comments on a proposal to require broadcasters to retain copies of programming as a way to improve the Commission's enforcement of 18 U.S.C. §1464. The Commission received several hundred comments on the proposal, nearly all of which were completely opposed to the possible regulations in any imaginable form. CBI, which represents college radio and television stations throughout the United States, filed comments opposing the regulations as unduly burdensome on broadcasters, as likely ineffective in serving the Commission's stated goals, and on constitutional grounds. CBI continues to oppose the regulations for all of those reasons, and files these reply comments to address comments in those areas filed by other parties.

The Proposed Requirements Impose
Unacceptable Financial and Operational Burdens on College Station Licensees.

2. CBI maintains its position that the proposed regulations will impose both a burdensome initial cost and significant ongoing costs (in both financial and human resources) on those licensees, supported by numerous comments from other non-commercial and small market broadcasters.[1]

3. Comments filed by the Alliance for Better Campaigns suggest that a monetary cost of "a few thousand dollars per year" would not be unreasonable. They could not be more wrong in the case of CBI's member stations, as well as for many other non-commercial educational broadcasters, and many small and medium market commercial broadcasters—the majority of licensees. The Alliance does not explain in any detail how they arrived at the "figure," and CBI's own mean initial cost estimate of $8000 for a redundant, audio-only system could not reasonably be characterized as "a few thousand." Other commenters also provided estimates in line with or exceeding CBI's estimates.[2] CBI demonstrated in our original comments, based on a survey of members, that for many CBI-member stations thousands of dollars exceeds the annual capital budget. Requiring this expenditure by a licensee would mean that other possible purchases which might benefit the community they serve with better programming, and which would address other FCC priorities such as localism, would have to be forsaken. For some stations, the potential cost equals or exceeds the entire annual budget. That burden, especially

[1] *E.g.,* ex-parte comments of Community Broadcasters Association; joint comments of NCE Broadcasters; comments of the Curators of the University of Missouri; comments of Hubbard Broadcasting.

[2] *See, e.g.,* comments of Elyria-Lorain Broadcasting; Bruce Goldsen, Jackson Radio Works; National Public Radio; and James P. Wagner.

when combined with the expected increase in forfeiture amounts,[3] potentially removes these licensees from service

4. Similarly, the suggestion by the Alliance that broadcasters should be obligated to provide program tapes for academic or interest group researchers is ridiculous. There is no legitimate reason to impose a burdensome obligation for licensees to fund the work of other entities. Indeed, many scholars and interest groups regularly record and analyze programming that is of interest to them,[4] and some organizations regularly archive various broadcasts.[5] This activity reflects both the interest in programming, and the ability of interested parties to acquire, analyze, and archive relevant programming. National interest groups that have issues regarding programming should avail themselves of the available archives or home recording technology as they pursue their agendas rather than suggesting that local licensees should have any responsibility to shoulder that burden.

5. Comments and reply comments filed by Voice Log serve their own interests, but do little for the interest of the public or broadcasters.[6] They suggest they could provide a recording service for annual cost ranges of $600 to $2400 for radio stations and $6000 to $24,000 for television stations. Again, these costs would be onerous for most CBI member stations,

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[3] See Broadcast Decency Enforcement Act of 2004, H.R. 3717 and S. 2056, passed by Congress in 2004 and awaiting conference committee action. The legislation would raise the penalty for a single violation of 18 U.S.C. §1464 to as much as $500,000--more than 18 times the current statutory maximum.

[4] *E.g.,* Bill McConnell, "Your Money or Your License," *Broadcasting & Cable,* Sept. 20, 2004, p. 1 (activists taping thousands of hours of television).

[5] The Vanderbilt News Archive contains more than 30,000 newscasts along with 9000 hours of news specials. The Museum of Television and Radio in New York and Los Angeles offers access to a wide range of recorded programs to scholars, as does the Museum of Broadcast Communications in Chicago.

[6] Similarly, the letter from OMT does little to offer new information to this proceeding. Further, the cost for a single turnkey system is $1495.00 and does not address installation, shipping and other costs associated with acquisition, not to mention redundancy, operation, and maintenance. Redundancy alone raises the cost of the system to almost $3,000.

especially at the top end of the ranges. Their estimates make assumptions that are unlikely to hold up in the real world. Most importantly, the cost estimates assume that multiple broadcasters in a market would subscribe and/or owners with multiple licenses would subscribe in several markets. CBI members are typically licensees with a single station in a single market, making them unable to negotiate a group discount with Voice Log or other provider (thus driving them to the top of the cost scale). The Voice Log comment also fails to address legal responsibility if their "99+%" system somehow fails, potentially subjecting a licensee to sanctions.

6. Comments filed by Rev. G. J. Gerard, general manager of WIHS, in favor of the proposed rules are not persuasive. The comments contain no details concerning the nature or quality of the recordings, the software used, any other pertinent information and, therefore, provide nothing tangible to asses the suitability of his system for use in other situations. Further, the comments do not address the questions raised by the Commission or concerns raised by fellow broadcasters.

The Proposed Requirements Will Not Significantly Improve Commission Enforcement of 18 U.S.C. § 1464.

7. Contrary to the comments filed by Morality in Media and U.S. Conference of Catholic Bishops (USCCB), the Commission's proposal will not improve the processing of complaints about indecent, profane or obscene programming. (Surprisingly, the Morality in Media and the USCCB comments are the only significant comments that seem to address this issue in a manner that supports the conclusion that the NPRM will improve enforcement. This is the motivating reason for the NPRM!) A requirement placing the evidentiary burden on broadcasters will make it far too simple for any disgruntled audience member, former employee, or other party seeking—for whatever reason—to harm the licensee, to target the broadcaster with

a series of frivolous complaints that will nevertheless require the significant expenditure of time and money by both the broadcaster and the Commission. The proposed regulations, therefore, are likely to make the process less efficient than the present system rather than improving it.

8. Comments filed by the USCCB suggest that requiring archived recordings will help the process because the general requirement for complainants to provide taped or transcribed evidence makes filing complaints difficult due to the "fleeting nature of indecent broadcast programs." However, this mischaracterizes both the nature of most such programs[7] and, more importantly, the Commission's standard for judging whether a program violates the law. Although the Commission has occasionally found "fleeting" instances indecent when there were other extreme factors to consider,[8] the FCC's own guidance for licensees notes that, in determining whether a program is indecent, "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."[9] Commenters in favor of the regulations have provided no evidence that substantial amounts of indecent programming are missed in the enforcement process because the audience was unable to provide a reasonably accurate representation to the Commission of what occurred.

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[7] Although there is apparently no cumulative and easily accessible public record of how many complaints individual programs or licensees have drawn, enforcement actions announced by the Commission concentrate primarily on programs that are well known for potentially content (*e.g.,* Howard Stern, Mancow Muller, Bubba the Love Sponge). Such content can hardly be described as "fleeting" (and indeed, most of the forfeitures issued by the Commission note the repeated nature of the offenses in assigning liability).

[8] *E.g.,* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Supre Bowl Halftime Show, *Notice of Apparent Liability* (the Janet Jackson incident) and Complaints Against Various Broadcast Licensees Concerning Their Airing of "The Golden Globe Awards" Program, *Memorandum Opinion and Order* (the Bono incident).

[9] Policy Statement in the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, at ¶ 17 (2001).

The Proposed Requirements are Unconstitutional and

Raise Additional Legal Problems for Licensees.

9. Numerous commenters,[10] including CBI, argued that the proposed regulations impose an unconstitutional chilling effect on protected speech. Comments filed by the Alliance for Better Campaigns and the U.S. Conference of Catholic Bishops in favor of the proposed regulations demonstrate just how easily this chilling effect could occur. Each suggests that the archives be made part of the station's public file, thus raising the possibility that the recorded material could be used for petitions to deny (and by implication for other legal proceedings against a station). Even if the Commission did not make the archives part of the public file initially, there would undoubtedly be continued pressure to do so. Any such requirement would force licensees to sanitize their programming of all but the most innocuous and inoffensive lowest-common denominator material in order to minimize the costs associated with the threat of legal harassment. Such a result is an anathema in a society that values a robust marketplace of ideas, and should be unacceptable to the FCC in light of ongoing policy efforts to promote diverse, local programming.

10. Morality in Media tries to save the proposed regulations from a First Amendment challenge by arguing that they do not need to meet a "compelling" government interest. The Supreme Court did not directly address the standard in *Pacifica Foundation v. FCC*;[11] however, the argument is refuted by the most recent federal court decisions in this area. In the *Action for*

[10] *E.g.,* comments of Association of Public Television Stations, Bonneville International Corporation, Broadcasters' Coalition, and National Public Radio.

[11] 438 U.S. 726 (1978).

Children's Television case[12] challenging the FCC's interpretation of 18 U.S.C. § 1464, the D.C. Circuit clearly spelled out the appropriate standard for First Amendment review:

> Unlike obscenity, indecent speech is protected under the first amendment; it may be regulated only by the least restrictive means necessary to promote a compelling state interest.[13]

However, even if we accept the Morality in Media position, for the sake of argument only, the proposed regulations still fail the first part of the analysis.[14] The means that are proposed here to address the alleged problem are certainly not the "least restrictive" available. It would be less restrictive, for example, to require recording and archiving only by stations previously subject to an adverse finding in an indecency complaint; or to require only locally originated programming to be recorded and archived.[15] The means proposed do not even meet the much lower intermediate scrutiny requirement of merely being narrowly tailored to the problem in question. The proposal targets a small alleged problem (approximately 1% of indecency complaints during a survey period, directed at an undoubtedly small number of licensees, were dismissed for lack of accompanying tape or transcript) by requiring ***all*** broadcast licensees, including those who have never been the subject of a complaint or a notice of apparent liability for a violation of 18 U.S.C. § 1464, to record nearly all of their programming, to archive those recordings for a lengthy period far beyond a reasonable time frame in which somebody might complain about the programming, and to absorb the costs of making those recordings available in the instance of any complaint alleging a violation of the indecency provisions, regardless of the merit of that complaint. Such a requirement is overbroad, and is not narrowly tailored.

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[12] Action for Children's Television *et al.* v. FCC, 59 F.3d 1249 (D.C. Cir. 1995).

[13] *Id.* at 1253

[14] *Supra* note 7.

11. Additional legal problems are raised in comments by USCCB suggesting the FCC should require broadcasters to run announcements informing the public of the right to acquire copies of the program. At the very least, the FCC has no statutory authority to alter copyright law and existing contracts in this manner. The typical program license for a radio or television station does not grant the station the right to distribute the program by non-broadcast means, thus running announcements that the programming is available just for the asking would make no sense. The station would be in violation of copyright law, and subject to substantial penalties, if they did provide copies to the public beyond the scope of their license.

If the FCC Adopts Program Recording Requirements the Scope of the Rules Should be Limited.

12. In our initial comment, CBI listed a number of protections that must be included if the Commission proceeds to adopt a program recording and retention rule, in order to protect the service these licensees provide to their local communities. These protections included an exemption from recording and retention requirements for small non-commercial educational (NCE) broadcasters; a limited retention period; limiting the purpose of the requirement to only 18 U.S.C. § 1464 investigations; and flexibility in terms of the technical standard of recording. Those suggestions were matched in many regards by comments from other non-commercial and small market licensees, including National Public Radio, a large joint comment from many NCE broadcasters,[16] the University of Missouri, and KZMU. We continue to urge the Commission to give special consideration to the needs of these stations and the service they provide.

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[15] These examples, however, are merely that. CBI does not support a taping and archiving requirement under any conditions.

[16] The joint comment was filed by Alabama Educational Television Commission, Arizona Board of Regents for Benefit of the University of Arizona, Arkansas Educational Television Commission, Central Michigan University, Chicago City Colleges, Greater Dayton Public Television, Greater Washington Educational Telecommunications Association, Inc., Hampton Roads Educational Telecommunications Association, Iowa Public Broadcasting Board,

Conclusion

13. For all of the reasons above, as well as those previously stated in our earlier comment, CBI continues to strenuously oppose the adoption of any regulations proposed in this Notice. We strongly urge the Commission to withdraw the proposal.

Respectfully Submitted,

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KCTS Television, Kent State University, Kentucky Authority for Educational Television, Maine Public Broadcasting Corporation, Milwaukee Area Technical College, Mountain Lakes Public Telecommunications Council, Newark Public Radio, The Ohio State University, Ohio University, Prairie Public Broadcasting, Inc., Regents of the University of California, Regents of the University of Minnesota, Regents of the University of New Mexico and Board of Education of the City of Albuquerque, New Mexico, South Carolina Educational Television Commission, St. Louis Regional Educational and Public Television Commission, University of Houston System, University of Oklahoma, University of Wisconsin System, WAMC / Northeast Public Radio, and the Wisconsin Educational Communications Board.